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No. 220

Supreme Court of the United States

OCTOBER TERM, 1956

MICHIGAN NATIONAL BANK, a National Banking Association, *Petitioner*,

v.

RAY M. GIDNEY, Comptroller of the Currency, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the District of Columbia Circuit in the above-entitled case.

OPINIONS BELOW

The order of the District Court appears at Appendix A, p. 15, and the opinion of the Court of Appeals at Appendix B, p. 16. Neither has been reported.

JURISDICTION

The final judgment of the Court of Appeals was entered on April 5, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

(1) Where the Congress has provided that national banks may, with the approval of the Comptroller of the Currency, consolidate into a single institution which shall be "deemed to be the same corporation as each of" its constituent banks and shall have and enjoy "all the rights, franchises and interests" of each, did the Court of Appeals, in holding that the right of a constituent bank to establish a branch did not survive consolidation, impose a restriction upon consolidated national banks contrary to the language and intent of Congress?

(2) Where a provision of the national banking statutes, having incorporated by reference a provision of state law, provides in effect that a national bank may establish a branch in a place where it is "located," is a national bank barred from establishing a branch in a city in which it has an office through which it has been conducting a full-scale banking business for many years?

STATUTES INVOLVED

The following provisions are set forth in Appendix C, p. 18:

Title 12, United States Code, Sections 33, 34, 34a and 36.

Michigan Financial Institutions Act, Section 34

STATEMENT

Petitioner is a national banking association organized and existing under the laws of the United States with its principal office in Lansing, Michigan (Joint App. 2, 20)[1] Prior to January 1, 1941, it operated as a national banking association in that city under the name, Lansing National Bank, and the Saginaw National Bank operated independently as a national banking association in Saginaw, Michigan (Joint App. 2-3, 20). On December 31, 1940, the Saginaw National Bank and five other national banks in the State of Michigan consolidated with the Lansing National Bank under the latter's charter pursuant to the Act of November 7, 1918, c. 209, 40 Stat. 1043, as amended (12 U.S.C. Sec. 33) (Joint App. 3, 20). Since the consolidation petitioner has operated under the name, Michigan National Bank and has maintained as branches the former principal offices of the constituent banks located in the several Michigan cities including Saginaw (Joint App. 3, 20). At the time of the consolidation a branch of the Saginaw National Bank was closed (Joint App. 25, 29).

On June 22, 1953, petitioner applied to respondent, the Comptroller of the Currency, for permission to establish and operate a new branch office in Saginaw, asserting two alternative grounds of eligibility as follows (Joint App. 5-6, 21):

(1) Under Section 36(c) of Title 12, U.S. Code, the Saginaw National Bank had authority to establish (subject only to the Comptroller's approval of the economic aspects) a new branch office in Saginaw, and

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[1] Petitioner, in reliance upon Rule 21(3), has filed with the Clerk of this Court ten copies of the Joint Appendix (referred to herein as "Joint App.") used in the Court of Appeals below.

petitioner, the consolidated continuation of the Saginaw National Bank, now enjoys identical authority under 12 U.S.C. Sections 34 and 34a; and

(2) Under 12 U.S.C. Section 36(c), which incorporates by reference the branch banking provisions of state (in this case, Michigan) law, petitioner has authority to establish (subject to similar approval by the Comptroller) a new branch office in Saginaw, a city in which it is "located."

The Comptroller sought and obtained from the Attorney General of Michigan an opinion with respect to petitioner's application. In such opinion the Attorney-General concluded that petitioner was ineligible to establish a new branch in Saginaw (Joint App. 6, 11-17). This conclusion was adopted by the Comptroller; he determined that petitioner was ineligible as a matter of law to establish the proposed branch and that he, the Comptroller, was therefore "precluded" from giving its application "further consideration" (Joint App. 11-12).

Petitioner thereupon brought suit against the Comptroller in the District Court, seeking a declaration (under the Federal Declaratory Judgments Act, 28 U.S.C. Section 2201, and Section 10 of the Administrative Procedure Act, 5 U.S.C. 1009) that the Comptroller's ruling on petitioner's eligibility to branch was erroneous (Joint App. 2). The Comptroller moved to dismiss the complaint on the ground that the District Court was without jurisdiction (R. 19). The court denied the motion (Joint App. 17, 18), but when both parties moved for summary judgment on the merits (R. 27, 29), the court denied petitioner's motion, granted respondent's cross motion, and entered judgment declaring that petitioner was in-

eligible as a matter of law to establish a second branch in Saginaw.

The Court of Appeals affirmed the judgment of the District Court and held that the action of the Comptroller in refusing to consider petitioner's application was based upon a proper construction of applicable law. In so deciding, the Court not only upheld the Comptroller's interpretation of a Michigan statute, but also, without reference to the controlling statute, sustained the Comptroller's construction of 12 U.S.C. section 34(a) so as to exclude the right to branch from the group of rights preserved upon consolidation.

REASONS FOR GRANTING THE WRIT

The Court of Appeals has, without evidence of any real consideration, decided an important question of Federal law which has not been, but should be, settled by this Court. Whether the rights of constituent banks to establish branches are preserved in a consolidated national bank has never been passed upon by this Court, nor prior to the present case, by any court. Since any curtailment of branching rights would place national banks at a competitive disadvantage with state banks, the question involved is one of vital importance in the administration of the National Banking Act.

The establishment and the continued healthful existence of the national banking system have created constitutional and statutory questions requiring resolution by this Court on numerous occasions. Foremost among such questions have been those which depend upon a determination of the proper relationship between state and national banks.

In 1918 a Federal statute for the first time provided a method by which individual national banks could consolidate into a single, stronger unit which could maintain offices at the locations formerly occupied by the constitutent banks. By the early 1920's, however, many of the states had authorized their own banking institutions to utilize a different means of expansion, namely, the power to branch. Branching was far simpler and more effective than anything available to national banks, and the latter soon began to fall behind competitively. And so in 1927 the Congress for the first time granted national banks affirmative statutory authority to open new branch offices without resort to the consolidation process. In the so-called McFadden Act it provided that national banks should be given expansion powers as broad as those enjoyed by their state competitors. The resulting legislation read as follows:

> "A national banking association may, after the date of the approval of this Act, establish and operate new branches within the limits of the city, town, or village in which said association is situated if such establishment and operation are at the time permitted to State banks by the law of the State in question." Act of Feb. 25, 1927, c. 191, 44 Stat. 1228.

In the early 1930's a catastrophic depression changed the entire banking situation: the complete collapse of the banking system of the nation was seriously threatened. On March 6, 1933, the President issued his proclamation declaring a bank holiday for all banking institutions in the United States. Something had to be done to bolster the critical financial situation of the nation. Certain measures were taken locally to

revive and strengthen state banks, but because comparatively little could be done for them by Federal legislation, the Congress not unnaturally turned its attention to the Federal banking system. It was, after all, an established, integrated, and nation-wide system which, through the supervision of the Comptroller, could present a relatively solid front against the national economic disaster. And so the Congress quickly took steps to permit national banks to strengthen their foundations. For the purposes of this case two such strengthening provisions are important: both were enacted in 1933; one was an amendment of the branching provision which had been written into the national banking laws in 1927; and the other was an amendment of the consolidation provisions that had been originally enacted in 1918.

The branching amendment made the following addition to the original limited version of the branching statute:

> "and (2) at any point within the State in which said association is situated, if such establishment and corporation are at the time authorized to State banks in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks." 48 Stat. 189.

This amendment was designed to allow individual national banks again to catch up with their state competitors where such competitors had received authority under state law to branch outside their home cities. And once again the Congress employed the device of tying the powers of individual national

banks directly to the law of the State in which they were located.

But of greater significance here is the 1933 amendment of the Federal consolidation provision. It directed that:

> "Upon . . . a consolidation of two or more national banking associations under section 33 of this title, *the corporate existence of each* of the constituent banks . . . participating in such consolidation *shall be merged into and continued in* the consolidated national banking association and *the consolidated association shall be deemed to be the same corporation as each* of the constituent institutions. *All the rights, franchises, and interests of each* of such constituent banks . . . shall be deemed to be *transferred to and vested in* such consolidated national banking association . . . [and the latter] shall hold and enjoy the same and all rights of property, franchises, and interests . . . in the same manner and to the same extent as such rights, franchises, and interests were held or enjoyed by any such constituent institution at the time of such consolidation. . . ." 48 Stat. 190 (emphasis supplied).

It provided that when national banks were consolidated, the resulting institution was to be able to do whatever any of its constituents could have done prior to the consolidation. Indeed, it went further than that: it not only authorized the consolidated bank to do anything one of the constituent banks could have done before the consolidation; it actually provided that each constituent bank should *continue in existence with all of its rights and powers undiminished.* Such powers, of course, would thenceforth be exercised in the name of the consolidated bank, but the powers to be exercised by the consolidated bank were none-

theless to be measured by reference to their source, namely, the continuing constituent banks.

The 1933 amendment of the consolidation provision of the national banking laws did *not* employ the technique of tying the powers of Federal consolidated banks to state law. It was intended by Congress to strengthen national banks by permitting them to combine together to form, not a new unitary bank, but a confederation, and accordingly it granted to the consolidated institution all of the powers and functions of the constituent banks. The result was to place such powers, including branching powers, in a category separate and apart from the powers of unitary national banks. That is to say, a unitary national bank was to be bound by the branching limitations imposed upon similar state banks by state law, but the 1933 consolidation provisions contemplated an allied institution which could exercise all of the branching powers of its constituent banks, and might thus achieve certain branching results which might or might not be achieved by a consolidated state institution. The factors which support this interpretation of the 1933 consolidation provisions and which were not, so far as its opinion shows, considered by the Court of Appeals are:

(a) Every court that has considered language substantially similar to that of the 1933 consolidation amendments has held that such language passes to the consolidated institution every valuable right, privilege or position of eligibility enjoyed by its constituents.[1]

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[1] Gontrum v. Union Liberty Life Ins. Co., 177 Md. 624, 11 A. 2d 625 (1940); Trester v. Missouri Pac. Ry. Co., 33 Neb. 171, 49 N.W. 1110 (1891); Central Railroad and Banking Co. v. Georgia, 92 U.S. 665 (1875); Atlantic and Gulf Railroad Co. v. Allen,

(b) In 1933 the Congress conferred upon unitary national banks new branching rights, and in the same statute, on the following page of the Statutes at Large, it provided that, in a consolidation, the participating unitary banks should continue in existence with *all* of their continuing rights available for exercise by the allied institution. Presumably the newly granted branching rights were meant to be included since they were fresh in the minds of Congress and were not excluded from the broad powers granted consolidated institutions.

(c) The Congress, although familiar with the device of tying the rights and powers of national banks to state law, did not do so with respect to the powers to be enjoyed by *consolidated* national banks; it did *not* say that a consolidated national bank can exercise only those powers which could be exercised by a consolidated state bank under state law.

(d) The necessity of fortifying the unified national banking system against the pressures of the economic depression of the early 1930's was a matter of primary concern to the Congress in 1933. As a step in fulfilling that need, the consolidation provisions were amended

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15 Fla. 637 (1876); Zimmer v. State, 30 Ark. 677 (1876); Commonweath v. Buffalo R. & P. Ry. Co., 207 Pa. 160, 56 A. 412 (1903); Consolidated Gas Co. v. Baltimore County Com'rs, 98 Md. 689, 57 A. 29 (1904); Punxsutawney Borough v. T. W. Phillips Gas & Oil Co., 238 Pa. 23, 85 A. 1003 (1913); First Nat'l Bank v. Lindberg, 293 Ill. App. 474, 12 N.E. 2d 917 (1938); cert. den., 305 U.S. 636 (1938); Central United Nat. Bank of Cleveland v. Abbott, 135 Ohio St. 37, 18 N.E. 2d 981 (1939); First Nat. Bank v. Harry E. Chapman Co., 160 Tenn. 72, 22 S.W. 2d 245 (1929). Where there is no express provision continuing the corporate existence of the constituent company, the results may be otherwise. See Ex parte Worcester County Nat. Bank of Worcester, 279 U.S. 347 (1929), etc.

so as to provide, for the first time, (1) for the consolidation of national banks with national banks, and (2) for the continuity of existence of the constituent institutions. The emphasis was clearly upon the national institutions and for this reason there was no limitation imposed by reference to state law.

Petitioner thus believes that it is eligible pursuant to the 1933 consolidation provision, to establish the branch in Saginaw for which it has applied. Being a confederation of the Lansing National Bank, the Saginaw National Bank, and five other unitary national banks in the State of Michigan, it is legally eligible to exercise the branching powers which each of those constituent banks can exercise under the Federal branching statute, 12 U.S.C. Section 36(c). To determine the extent of such constitutents' rights under the latter statute, it is necessary to turn to Michigan law, which provides that:

> "Any bank may, with the written approval of the [state banking] commission, establish and operate a branch or branches within the limits of the city or village in which said bank is located: . . . "[1]

The Saginaw National Bank until 1940 had its head office in Saginaw, and, under 12 U.S.C. Section 34a, it continues in existence today with its rights and powers undiminished. It is today eligible, therefore, to establish "a branch or branches" in the City of

[1] Section 34 of the Michigan Financial Institutions Act. Although a state bank invoking this provision must seek the permission of the State banking commission, the Supreme Court of Michigan has correctly held that national banks seeking eligibility under 12 U.S.C. Section 36(c) need not do so; for them only the economic approval of the Federal Comptroller of the Currency is required. Rushton v. Michigan National Bank, 298 Mich. 417, 299 N.W. 129 (1941).

Saginaw under the terms of 12 U.S.C. Section 36(c) and the Michigan statute quoted above. It now operates, it is true, under the name "Michigan National Bank," but statutory authority to establish branches in Saginaw has been made available to it under the clear and unambiguous language of the 1933 amendments of the Federal banking statutes.

The Comptroller, and presumably the Courts below, in disregard of the Federal statutory provision for the continued existence of the separate constituents, considered petitioner as a *unitary* bank "located" only at the place of its head office, Lansing, and not in Saginaw, for the purposes of Section 34 of the Michigan Financial Institutions Act.[1]

What they have overlooked is that petitioner is not a new unitary bank but rather an allied or *consolidated* national bank; and that as such it enjoys certain derivative rights which a unitary bank does not have. The Court of Appeals completely ignored this essential characteristic and as a result, failed to observe the mandate of Congress expressed in the 1933 amendment to the consolidation provisions of the national banking laws.

Denial of petitioner's eligibility to establish a second branch in Saginaw not only defeats the Congressional

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[1] Petitioner's alternative contention in the courts below was that it is "located" in Saginaw in its own right for the purposes of Section 34 of the Michigan bank statute; it has, after all, been doing a full-scale banking business in Saginaw for the past fifteen years. Petitioner does not address itself to an interpretation of this Michigan statute at this time because it regards the other purely Federal questions in this case to be of paramount importance. It respectfully reserves the right, however, to present the question to the court in the event that the instant petition is granted.

purpose, as pointed out above, it also imposes an arbitrary restriction upon the natural growth of national banks and penalizes the communities they serve. Such a bank may legally enter a particular city through a consolidation and may establish itself as a useful member of the community. Yet, under the decision below, no matter how well qualified economically the bank may be to expand its services in the community, no matter how much the community may need its services, and no matter how hard it may be pressed by competing institutions, the bank would be barred from ever opening additional offices in that city. To survive, banks must serve communities—entire communities. A legislative purpose which would make it impossible for a bank to serve adequately the entire community in which it is legally operating should be found only if explicitly expressed. The Congress has not so expressed itself. On the contrary, it has explicitly provided that a consolidated bank should enjoy the sum of the rights and powers of its constituents, and has not excluded branching rights from this broad grant of authority.

CONCLUSION

The Court of Appeals has erroneously decided, without consideration of petitioner's contentions, a question of substantial importance in the administration of the national banking laws, and more particularly in the determination of the relationship between national and state banks which, for the reasons stated, warrants review by the Court. Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

Order

Upon consideration of the plaintiff's motion for summary judgment, the points and authorities in support of and in opposition to the motion and the cross motion for summary judgment of the defendant, the points and authorities in support of and in opposition to the motion, and oral argument, and the Court having concluded, as a matter of law, that the phrase "any bank may" used in the second paragraph of Section 34 of the Michigan Financial Institutions Act means a parent bank and not a branch bank, and that only the parent bank has authority to apply for banking privileges, and that the phrase "city or village in which said bank is located" means a city or village in which the parent bank is located and not a branch bank; and the Court having further concluded, as a matter of law, that no branch banking rights flow from the consolidation with the Saginaw National Bank because branches may be established only upon the conditions prescribed by Section 36 of Title 12 of the United States Code, the Comptroller of the Currency is precluded by law from considering plaintiff's application to establish a second branch office in Saginaw, Michigan, and it is, therefore, this 16th day of June, 1955,

ADJUDGED, ORDERED and DECLARED that plaintiff's motion for summary judgment be and the same is hereby denied, and that the defendant's cross motion for summary judgment be and the same is hereby granted.

(Signed) EDWARD M. CURRAN
Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12848

MICHIGAN NATIONAL BANK, LANSING, MICHIGAN,
A NATIONAL BANKING ASSOCIATION, APPELLANT

v.

RAY M. GIDNEY, COMPTROLLER OF THE CURRENCY,
APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided April 5, 1956

Mr. John Lord O'Brian, with whom *Messrs. Daniel M. Gribbon* and *Roberts B. Owen* were on the brief, for appellant.

Mr. Oliver Gasch, Principal Assistant United States Attorney, with whom *Messrs. Leo A. Rover*, United States Attorney, *Lewis Carroll* and *Joseph M. F. Ryan, Jr.*, were on the brief, for appellee.

Mr. John H. Pratt filed a brief on behalf of the State of Michigan as *amicus curiae*, urging affirmance.

Before BAZELON, DANAHER and BASTIAN, Circuit Judges.

PER CURIAM: Appellant, Michigan National Bank, was formed in 1940 out of a consolidation of six national banks, two of which were in Saginaw and Lansing, under a single charter which designated Lansing as the main office. Some years thereafter, appellant applied to the then Comptroller of the Currency for permission to establish a branch for its Saginaw component. Section 36(c) of Title 12 U.S.C. authorizes national banks to establish and operate branches

> "if such establishment and operation are at the time authorized to State banks by the statute law of the

State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks.'"[1]

[1] 66 STAT. 633 (1952).

Section 34 of the Michigan Financial Institutions Act provides, *inter alia*, that "any bank may . . . establish and operate a branch or branches within the limits of the city . . . *in which said bank is located.*" (Emphasis supplied.) On July 14, 1954, the present Comptroller, appellee herein, advised appellant that he agreed with the view of the Attorney General of the State of Michigan, the General Counsel for the United States Treasury, and his own counsel, that the italicized words from the above-quoted State statute "refer to where the main office of the bank is located," and does not refer, as appellant argued, to the place in which the "bank or any branch thereof is located." Appellee therefore ruled that 12 U.S.C. § 36(c) (1952) forbade approval of a second branch bank in Saginaw. Appellant thereupon brought this declaratory judgment suit challenging appellee's action. On cross-motions, the District Court granted summary judgment for appellee. This appeal followed.

We think appellee's action was based upon a proper construction of applicable law. The summary judgment upholding his action is, therefore,

Affirmed.

APPENDIX C

SUPPLEMENT OF STATUTES
TITLE 12, UNITED STATES CODE

SECTION 33. CONSOLIDATION OF BANKS; CAPITAL STOCK; DISSENTING SHAREHOLDERS; NOTICE; VALUATION OF SHARES.

Any two or more national banking associations located within the same State, county, city, town, or village may, with the approval of the Comptroller of the Currency, consolidate into one association under the charter of either existing banks, on such terms and conditions as may be lawfully agreed upon by a majority of the board of directors of each association proposing to consolidate, and be ratified and confirmed by the affirmative vote of the shareholders of each such association owning at least two-thirds of its capital stock outstanding, at a meeting to be held on the call of the directors after publishing notice of the time, place, and object of the meeting for four consecutive weeks in some newspaper published in the place where the said association is located, and if no newspaper is published in the place, then in a paper published nearest thereto, and after sending such notice to each shareholder of record by registered mail at least ten days prior to said meeting: *Provided*, That the capital stock of such consolidated association shall not be less than that required under existing law for the organization of a national bank in the place in which it is located: *And provided further*, That if such consolidation shall be voted for at said meetings by the necessary majorities of the shareholders of each of the associations proposing to consolidate, any shareholder of any of the associations so consolidated, who has voted against such consolidation at the meeting of the association of which he is a shareholder or has given notice in writing at or prior to such meeting to the presiding officer that he dissents from the plan of consolidation, shall be entitled to receive the value of the shares so held by him

if and when said consolidation shall be approved by the Comptroller of the Currency, such value to be ascertained as of the date of the Comptroller's approval by an appraisal made by a committee of three persons, one to be selected by the shareholder, one by the directors, and the third by the two so chosen; and in case the value so fixed shall not be satisfactory to the shareholder he may within five days after being notified of the appraisal appeal to the Comptroller of the Currency, who shall cause a reappraisal to be made, which shall be final and binding; and if said reappraisal shall exceed the value fixed by said committee, the bank shall pay the expenses of the reappraisal; otherwise the appellant shall pay said expenses, and the value so ascertained and determined shall be deemed to be a debt due and be forthwith paid to said shareholder from said bank, and the share so paid shall be surrendered and after due notice sold at public auction within thirty days after the final appraisement provided for in this section.

Publication of notice and notification by registered mail of the meeting provided for in the foregoing paragraph may be waived by unanimous action of the shareholders of the respective associations. Where a dissenting shareholder has given notice as above provided to the association of which he is a shareholder of his dissent from the plan of consolidation, and the directors thereof fail for more than thirty days thereafter to appoint an appraiser of the value of his shares, said shareholder may request the Comptroller of the Currency to appoint such appraiser to act on the appraisal committee for and on behalf of such association.

If shares, when sold at public auction in accordance with this section, realize a price greater than their final appraised value, the excess in such sale price shall be paid to the shareholder. The consolidated association shall be liable for all liabilities of the respective consolidating associations. In the event one of the appraisers fails to

agree with the others as to the value of said shares, then the valuation of the remaining appraisers shall govern. (Nov. 7, 1918, ch. 209, § 1, 40 Stat. 1043; June 16, 1933, ch. 89, § 24(a), 48 Stat. 190; Aug. 23, 1935, ch. 614, § 330, 49 Stat. 718.)

SECTION 34. EFFECT OF CONSOLIDATION ON RIGHTS AND LIABILITIES.

Associations consolidating with another association under the provisions of section 33 of this title shall not be required to deposit lawful money for their outstanding circulation, but their assets and liabilities shall be reported by the association with which they have consolidated. And all the rights, franchises, and interests of the said national bank so consolidated in and to every species of property, personal and mixed, and choses in action thereto belonging, shall be deemed to be transferred to and vested in such national bank into which it is consolidated without any deed or other transfer, and the said consolidated national bank shall hold and enjoy the same and all rights of property, franchises, and interests in the same manner and to the same extent as was held and enjoyed by the national bank so consolidated therewith. (Nov. 7, 1918, ch. 209, § 2, 40 Stat. 1044.)

SECTION 34a. CONSOLIDATION OF STATE BANK, ETC., WITH NATIONAL BANK; CAPITAL STOCK; DISSENTING SHAREHOLDERS.

Any bank incorporated under the laws of any State, or any bank incorporated in the District of Columbia, may be consolidated with a national banking association located in the same State, county, city, town, or village under the charter of such national banking association on such terms and conditions as may be lawfully agreed upon by a majority of the board of directors of each association or bank proposing to consolidate, and which agree-

ment shall be ratified and confirmed by the affirmative vote of the shareholders of each such association or bank owning at least two-thirds of its capital stock outstanding, or by a greater proportion of such capital stock in the case of such State bank if the laws of the State where the same is organized so require, at a meeting to be held on the call of the directors after publishing notice of the time, place, and object of the meeting for four consecutive weeks in some newspaper of general circulation published in the place where the said association or bank is situated, and in the legal newspaper for the publication of legal notices or advertisements, if any such paper has been designated by the rules of a court in the county where such association or bank is situated, and if no newspaper is published in the place, then in a paper of general circulation published nearest thereto, unless such notice of meeting is waived in writing by all stockholders of any such association or bank, and after sending such notice to each shareholder of record by registered mail at least ten days prior to said meeting, but any additional notice shall be given to the shareholders of such State bank which may be required by the laws of the State where the same is organized. The capital stock of such consolidated association shall not be less than that required under existing law for the organization of a national banking association in the place in which such consolidated association is located. Upon such a consolidation, or upon a consolidation of two or more national banking associations under section 33 of this title, the corporate existence of each of the constituent banks and national banking associations participating in such consolidation shall be merged into and continued in the consolidated national banking association and the consolidated association shall be deemed to be the same corporation as each of the constituent institutions. All the rights, franchises, and interests of each of such constituent banks and national banking associations in and to every species of property, real, personal, and

mixed, and choses in action thereto belonging, shall be deemed to be transferred to and vested in such consolidated national banking association without any deed or other transfer; and such consolidated national banking association, by virtue of such consolidation and without any order or other action on the part of any court or otherwise, shall hold and enjoy the same and all rights of property, franchises, and interests, including appointments, designations, and nominations and all other rights and interests as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics and in every other fiduciary capacity, in the same manner and to the same extent as such rights, franchises, and interests were held or enjoyed by any such constituent institution at the time of such consolidation: *Provided, however*, That where any such constituent institution at the time of such consolidation was acting under appointment of any court as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics or in any other fiduciary capacity, the consolidated national banking association shall be subject to removal by a court of competent jurisdiction in the same manner and to the same extent as was such constituent corporation prior to the consolidation, and nothing herein contained shall be construed to impair in any manner the right of any court to remove such a consolidated national banking association and to appoint in lieu thereof a substitute trustee, executor, or other fiduciary, except that such right shall not be exercised in such a manner as to discriminate against national banking associations, nor shall any such consolidated association be removed solely because of the fact that it is a national banking association. If such consolidation shall be voted for at said meetings by the necessary majorities of the shareholders of the association and of the State or other bank proposing to consolidate, and thereafter the consolidation shall be approved by the Comptroller

of the Currency, any shareholder of either the association or the State or other bank so consolidated, who has voted against such consolidation at the meeting of the association of which he is a stockholder, or has given notice in writing at or prior to such meeting to the presiding officer that he dissents from the plan of consolidation, shall be entitled to receive the value of the shares so held by him if and when said consolidation shall be approved by the Comptroller of the Currency, such value to be ascertained as of the date of the Comptroller's approval by an appraisal made by a committee of three persons, one to be selected by the shareholder, one by the directors of the consolidated association, and the third by the two so chosen; and in case the value so fixed shall not be satisfactory to such shareholder he may within five days after being notified of the appraisal appeal to the Comptroller of the Currency, who shall cause a reappraisal to be made, which shall be final and binding; and the consolidated association shall pay the expenses of reappraisal, and the value as ascertained by such appraisal or reappraisal shall be deemed to be a debt due and shall be forthwith paid to said shareholder by said consolidated association, and the shares so paid for shall be surrendered and, after due notice, sold at public auction within thirty days after the final appraisement provided for in this section; and if the shares so sold at public auction shall be sold at a price greater than the final appraised value, the excess in such sale price shall be paid to the said shareholder; and the consolidated association shall have the right to purchase such shares at public auction, if it is the highest bidder, therefor, for the purpose of reselling such shares within thirty days thereafter to such person or persons and at such price as its board of directors by resolution may determine. The liquidation of such shares of stock in any State bank shall be determined in the manner prescribed by the law of the State in such cases if such provision is made in the State law; otherwise as hereinbefore provided. No such

consolidation shall be in contravention of the law of the State under which such bank is incorporated.

Where a dissenting shareholder has given notice as provided in this section to the bank of which he is a shareholder of his dissent from the plant of consolidation, and the directors thereof fail for more than thirty days thereafter to appoint an appraiser of the value of his shares, said shareholder may request the Comptroller of the Currency to appoint such appraiser to act on the appraisal committee for and on behalf of such bank. In the event one of the appraisers fails to agree with the others as to the value of said shares, then the valuation of the remaining appraiser shall govern. (Nov. 7, 1918, ch. 209, § 3, as added Feb. 25, 1927, ch. 191, § 1, 44 Stat. 1225, and amended June 16, 1933, ch. 89, § 24, 48 Stat. 190; Aug. 23, 1935, ch. 614, § 331, 49 Stat. 719; July 14, 1952, ch. 722, § 2, 66 Stat. 601.)

SECTION 36. BRANCH BANKS.

The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:

(a) A national banking association may retain and operate such branch or branches as it may have had in lawful operation on February 25, 1927, and any national banking association which continuously maintained and operated not more than one branch for a period of more than twenty-five years immediately preceding February 25, 1927, may continue to maintain and operate such branch.

(b) If a State bank is after February 25, 1927, converted into or consolidated with a national banking association, or if two or more national banking associations are consolidated, such converted or consolidated association may, with respect to any of such banks, retain and operate any of their branches which may have been in lawful operation by any bank on February 25, 1927.

(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. In any State in which State banks are permitted by statute law to maintain branches within county or greater limits, if no bank is located and doing business in the place where the proposed agency is to be located, any national banking association situated in such State may, with the approval of the Comptroller of the Currency, establish and operate, without regard to the capital requirements of this section, a seasonal agency in any resort community within the limits of the county in which the main office of such association is located, for the purpose of receiving and paying out deposits, issuing and cashing checks and drafts, and doing business incident thereto: *Provided*, That any permit issued under this sentence shall be revoked upon the opening of a State or national bank in such community. Except as provided in the immediately preceding sentence, no such association shall establish a branch outside of the city, town, or village in which it is situated unless it has a combined capital stock and surplus equal to the combined amount of capital stock and surplus, if any, required by the law of the State in which such association is situated for the establishment of such branches by State banks, or, if the law of such State requires only a minimum capital stock for the establishment of such branches by State banks, unless such association has not less than an equal amount of capital stock.

(dd) The aggregate capital of every national banking association and its branches shall at no time be less than the aggregate minimum capital required by law for the establishment of an equal number of national banking associations situated in the various places where such association and its branches are situated.

(e) No branch of any national banking association shall be established or moved from one location to another without first obtaining the consent and approval of the Comptroller of the Currency.

(f) The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

(g) This section shall not be construed to amend or repeal sections 601-604 of this title, authorizing the establishment by national banking associations of branches in foreign countries, or dependencies, or insular possessions of the United States.

(h) The words "State bank," "State banks," "bank," or "banks," as used in this section, shall be held to include trust companies, savings banks, or other such corporations or institutions carrying on the banking business under the authority of State laws. (R.S. § 5155; Feb. 25, 1927, ch. 191, § 7, 44 Stat. 1228; June 16, 1933, ch. 89, § 23, 48 Stat. 189, 190; Aug. 23, 1935, ch. 614, § 305, 49 Stat. 708; July 15, 1952, ch. 753, § 2(b), 66 Stat. 633.)

MICHIGAN FINANCIAL INSTITUTIONS ACT

* * * * * * * * * *

SECTION 34. BANK; BRANCHES.

Any bank having a capital of at least $50,000.00 may, with the written approval of the commission, establish and

operate a branch or branches within a village or city other than that in which it was originally chartered: Provided, That the village or city in which it is proposed to establish and operate a branch is located in the same county in which the parent bank has its principal office or, if not in said county, then within 25 miles of said parent bank or in a contiguous county at a point more than 25 miles from the parent bank, if such county has no bank: Provided further, That no such branch shall be established in a city or village in which a state or national bank or branch thereof is then in operation: Provided further, That the commission shall not grant such approval unless the parent bank has capital and surplus in an amount at least equal to the aggregate minimum capital and surplus, respectively, required for the establishment of a bank in each of the various places where such bank and its branches are to be located and unless the commission is satisfied as to the sufficiency of the capital and surplus of the bank, the necessity for the establishment of such branch or branches and the prospects of successful operation if established.

Any bank may, with the written approval of the commission, establish and operate a branch or branches within the limits of the city or village in which said bank is located: Provided, That the commission is satisfied as to the necessity for the establishment of such branch and the prospects of successful operation if established. No branch of any such bank shall be moved from 1 location to another within the same city or village without the written approval of the commission.

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 220

MICHIGAN NATIONAL BANK, A NATIONAL BANKING ASSOCIATION, PETITIONER

v.

RAY M. GIDNEY, COMPTROLLER OF THE CURRENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the District Court (R. 66–67) is not reported. The *per curiam* opinion of the Court of Appeals (Pet. App. B, 16–17) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on April 5, 1956. The petition for a writ of certiorari was filed on June 29, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Under R. S. 5155 (as amended), 12 U. S. C. 36 (c), the right of a national banking association to

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393046—56——1

establish and operate a branch bank is dependent upon whether such establishment and operation are authorized to state banks by the statute law of the state involved. Petitioner, a national bank with its main office in Lansing, Michigan, seeks to establish and operate an additional branch in Saginaw, Michigan. The first question presented is whether the establishment and operation of such a Saginaw branch would be authorized to state banks by the statute law of Michigan.

2. If question 1 is answered in the negative, the question presented is whether the state limitations on the establishment and operation of branch national banks, as incorporated by reference in 12 U. S. C. 36 (c), are avoided in this case by the fact that petitioner happened to be formed out of a consolidation with six other national banks.

STATUTES INVOLVED

Pertinent parts of the Michigan Financial Institutions Act and of the National Banking Act, as amended, 12 U. S. C. 21, *et seq.*, are set forth in the Appendix, *infra*, pp. 15–19.

STATEMENT

Petitioner is a national banking association organized and existing under the laws of the United States with its principal office in Lansing, Ingham County, Michigan (R. 2). Prior to January 1, 1941, petitioner operated in Lansing under the name of Lansing National Bank (R. 2). Effective January 1, 1941, the Lansing National Bank consolidated with the Saginaw National Bank and five other national

banks in the State of Michigan (R. 3). Since the consolidation, petitioner has operated in Lansing under the charter of the Lansing National Bank and under the name of Michigan National Bank (R. 3). The Saginaw National Bank and the five other consolidated banks have, since 1941, been operated as branch offices in six Michigan cities (R. 3). See footnote 8, *infra*, p. 13.[1]

In July 1946, petitioner, through its president, H. J. Stoddard, requested that the Comptroller of the Currency give written clarification of the reasons why the Michigan National Bank could not establish additional branch offices in the several communities, other than Lansing, where it maintained branch offices (R. 25–26). Petitioner was advised in reply that the further expansion of branching operations was precluded by Michigan and federal law (R. 26–27).

By letter dated September 6, 1950, petitioner sought permission from the Comptroller to establish and operate a second branch office in Saginaw, Michigan (R. 27–32). Permission was in effect denied through a letter from the Deputy Comptroller, dated September 20, 1950 (R. 32–33). Permission was similarly sought in petitioner's letter of September 22, 1950 (R. 33–34), and again denied by the Deputy Comptroller's reply of October 6, 1950 (R. 35–36).

[1] In addition to the Saginaw branch, petitioner maintains twelve branch offices, including two in Battle Creek, one in Flint, one in Grand Rapids, three offices in Lansing, one office in Marshall, and four in Port Huron (R. 10–11, 38–39). Pursuant to R. S. 5155, as amended, 12 U. S. C. 36 (b), App., *infra*, pp. 17–18, a branch of the consolidated Saginaw National Bank and three branches of the consolidated Grand Rapids bank were discontinued in 1941 following the consolidation (R. 9, 25, 29, 32–33). (*See* fn. 7, *infra*, p. 12.)

In June 1953, petitioner renewed its request for permission to establish additional branches in the cities where it maintained branch banking offices (R. 37–38). On January 5, the Comptroller again advised that the proposed establishment of a second branch office at Saginaw would not be legally permissible under Michigan law (R. 45–46). And on July 14, 1954, petitioner was further informed by the Comptroller that he could not approve the establishment of a second branch of the Michigan National Bank in Saginaw because, under Michigan law as adopted by reference in the National Bank Act and as interpreted by the Comptroller's counsel, the General Counsel of the Treasury Department, and the Attorney General of the State of Michigan, the establishment of an additional bank in Saginaw was not legally permissible (R. 53–54).

On July 23, 1954, by complaint filed in the United States District Court (R. 2–8), petitioner sought a declaration that the Comptroller of the Currency was not precluded by Michigan law from considering petitioner's application to establish and operate a branch office in Saginaw (R. 7–8). On cross motions for summary judgment, the District Court denied petitioner's motion and granted that of the Comptroller (R. 66–67).

The Court of Appeals, *per curiam*, affirmed, holding that the Comptroller's refusal to approve the establishment of a second branch bank in Saginaw by petitioner was based upon a proper construction of Section 34 of the Michigan Financial Institutions Act, which, under Michigan law, governs branching

rights of state banks and which, under 12 U. S. C. 36 (c), is determinative of the branching rights of a national banking association (Pet. App. B, 16–17).

ARGUMENT

1. In its pertinent part, R. S. 5155, as amended, 12 U. S. C. 36 (App., *infra*, pp. 17–19) provides as follows:

> The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:
>
> * * * * *
>
> (c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, *if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question;* and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question *by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks.* * * * [Emphasis added.]

Thus, as a national banking association in Lansing, Michigan, petitioner's authority to establish and operate a new branch office in Saginaw is, under federal law, dependent upon the statute law of Michigan relating to branching activities by state banks. In considering the propriety of respondent's refusal to

authorize a second branch bank in Saginaw, the Court of Appeals therefore looked to Section 34 of the Michigan Financial Institutions Act (App. *infra*, pp. 15–16) which prescribes the conditions and limitations for the establishment and operation of branch banks by state banking institutions. On the basis of its construction of that statute, the court below held that a state bank, in petitioner's circumstances, could not under Michigan law establish and operate the additional Saginaw branch which petitioner sought to have approved by respondent.

The construction given the state statute by the court is a reasonable one; it is in accord with the expressed opinion of the Attorney General of Michigan (R. 40–41; see *infra*, p. 9) and conforms to the interpretation and practice of the State Banking Department of the State of Michigan (R. 56–59; see *infra*, p. 9). Involving, as it does, primarily a question of a state law, the case is of only local application and of limited importance; further review by this Court therefore appears unwarranted.[2]

In any event, the Court of Appeals' construction of the state law is correct. Section 34 of the Michigan Financial Institutions Act (App., *infra*, pp. 15–16) discloses an obvious legislative purpose to restrict nar-

[2] Since the disposition of the case ultimately calls for the construction and application of the state statute without benefit of an authoritative pronouncement by the state courts, any decision in this case by a federal court will be clouded with uncertainty until the statute has been authoritatively construed by the Supreme Court of Michigan. For this additional reason the petition for a writ of certiorari should be denied. See *Federation of Labor* v. *McAdory*, 325 U. S. 450, 462, 471.

rowly the branching operations of state banks in cities other than the city where the bank is chartered to do a banking business. The initial paragraph of Section 34 permits the establishment and operation of a branch or branches within a village or city *other* than that in which the bank is originally chartered, only if (App., *infra*, p. 15):

> * * * [t]he village or city in which it is proposed to establish and operate a branch is located in the same county in which the parent bank has its principal office or, if not in said county, then within 25 miles of said parent bank or in a contiguous county at a point more than 25 miles from the parent bank, if such county has no bank: *Provided further,* That no such branch shall be established in a city or village in which a state or national bank or branch thereof is then in operation: *Provided further,* That the commission shall not grant such approval unless the parent bank has capital and surplus in an amount at least equal to the aggregate minimum capital and surplus, respectively, required for the establishment of a bank in each of the various places where such bank and its branches are to be located and unless the commission is satisfied as to the sufficiency of the capital and surplus of the bank, the necessity for the establishment of such branch or branches and the prospects of successful operation if established.

Petitioner has never suggested that the proposed Saginaw branch qualifies under these conditions and limitations imposed by the Michigan legislature. To avoid the geographical limitations of this first para-

graph of Section 34, which clearly preclude the establishment of the Saginaw branch,[3] resort is had to the second paragraph of Section 34 (App. *infra,* pp. 15–16) which declares:

> Any bank may * * * establish and operate a branch or branches within the limits of the city or village in which said bank is located: * * *

Petitioner contends that, because it now maintains a branch in Saginaw, it is "located" in that city within the meaning of the Michigan statute and may establish additional branches there, without regard to the limitations in the first paragraph of Section 34. It must follow that, if petitioner is "located" in Saginaw for branching purposes, it is also "located" in each of the five other cities in which it maintains branches.[4] While petitioner proposes at this time to establish only an additional Saginaw branch, it is clear that its construction of the state statute, if upheld, would lead to a wholesale avoidance of the geographical limitations which the state has imposed upon the establishment and operation of state branch banks in a city or village other than that in which the bank is chartered.

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[3] Neither Saginaw, nor the other cities where petitioner maintains branch offices, is in the same county in which the parent bank is located; none is within 25 miles of Lansing and none is in a county contiguous to Ingham County in which Lansing is situated.

[4] The second paragraph of Section 34 of the Michigan Act refers, in terms, to "*the city or village* in which said bank is located." The legislative use of the singular, "city or village," is, of itself, a denial of petitioner's premise that a bank, for branching purposes, may have more than one location. Petitioner's view, of course, would require that "the city or village" be read as "the cities or villages" in which the bank is located.

The Court of Appeals' interpretation of Section 34 of the Michigan Act fully accords with that of the state authorities. The State Banking Department of Michigan has advised that, in administering Section 34, it has adhered to the following interpretation (R. 57):

> 1. The place (community) where a bank is "located" is construed to mean the city or village in which its main office is located, and does not include any other city or village in which a branch or branches of the bank may be located. The main office of a bank is construed to be the "parent" bank for the purpose of determining whether the establishment of a branch may be authorized.

And, in the opinion of the State Attorney General, rendered in December, 1953, the phrase—"in which said bank is located"—in Section 34, "must be construed to mean only in the place where its [a bank's] main office is located and cannot be extended to mean the limits of every city or village in which a bank or a branch thereof may be presently located" (R. 40–45 at 43).[5]

The views and long-standing interpretation of state law by these state authorities are based upon a familiarity with state law and an intimate understanding of the legislative background and policy underlying

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[5] An interpretation of a state statute by an interested administrative agency, concurred in by the state attorney general, is accorded particular deference by the Supreme Court of Michigan. *People* v. *Robinson*, 241 Mich. 497, 217 N. W. 902. Unless clearly erroneous, like respect should be accorded in a federal court. *Badger* v. *Hoidale*, 88 F. 2d 208, 211 (C. A. 8).

Section 34.[6] It would require a far greater showing than petitioner could make to impel a Federal court to pronounce a contrary interpretation which, in the teeth of the policy of 12 U. S. C. 36 (c), would effectively create branching rights in a national bank unavailable to a state bank in like circumstances. Cf. *Federation of Labor* v. *McAdory*, 325 U. S. 450; *Alabama Comm'n* v. *Southern R. Co.*, 341 U. S. 341; *Burford* v. *Sun Oil Co.*, 319 U. S. 315; *Davies Warehouse Co.* v. *Bowles*, 321 U. S. 144; *Gauley Mountain Coal Co.* v. *Director of the United States Bureau of Mines*, 224 F. 2d 887 (C. A. 4).

2. While petitioner does predicate its right to establish a Saginaw branch upon Section 34 of the Michigan Act (Pet. 12), in the alternative it urges that under 12 U. S. C. 34a (App., *infra*, pp. 16–17) a right to establish a branch bank in Saginaw, free of the conditions and limitations of Section 34 of the Michigan Act, flows from the 1941 consolidation of the Saginaw National Bank with petitioner's predecessor in name, the Lansing National Bank (*supra*, pp. 2–3). Though this point was briefed and argued in the Court of Appeals, the court, in its *per curiam* opinion, apparently considered it unnecessary to discuss it and affirmed the order of the District Court stating that "the Court having further concluded, as a matter of law, that no branch banking rights flow from the

[6] The legislative history of Section 34, as well as prior legislation on the subject of branch banking in Michigan, has been compiled by the State Attorney General's Office and appears at pages 59–65 of the printed record. This history fully bears out the judicial and administrative interpretation of the present Michigan law.

consolidation with the Saginaw National Bank because branches may be established only upon the conditions prescribed by Section 36 of Title 12 of the United States Code" (Pet. App. A, 15). With the courts below, we submit that this contention, pressed with particular emphasis in this Court (Pet. pp. 5–13) but never before made by a national bank seeking branching privileges, is meritless.

Section 33, 12 U. S. C. (App., *infra*, p. 16), authorizes the consolidation of any two or more national banking associations; it was pursuant to this authority that the 1941 consolidation involving petitioner was consummated. Section 34a of Title 12 similarly authorizes the consolidation of a state bank with a national bank, and then goes on to provide that:

> * * * Upon such a consolidation, * * * the corporate existence of each of the constituent banks and national banking associations participating in such consolidation shall be merged into and continued in the consolidated national banking association and *the consolidated association shall be deemed to be the same corporation as each of the constituent institutions.* All of the rights, franchises, and interests of each of such constituent banks and national banking associations in and to *every species of property, real, personal, and mixed, and choses in action thereto belonging,* shall be deemed to be transferred to and vested in such consolidated national banking association without any deed or other transfer; *and such consolidated national banking association, by virtue of such consolidation and without any order or other action on the part of any court or otherwise,*

> *shall hold and enjoy the same and all rights of property, franchises, and interests,* including appointments, designations, and nominations and all other rights and interests as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics and in every other fiduciary capacity, *in the same manner and to the same extent as such rights, franchises, and interests were held or enjoyed by any such constituent institution at the time of such consolidation:* * * * [Emphasis added.]

From this general language in Section 34a, petitioner infers that, by virtue of the 1941 consolidation, the parent bank located in Lansing inherited and now retains all branching rights that its constituents had at the time of consolidation in 1941.

But as we have previously pointed out and as held by the court below, the retention, establishment, and operation of branches by national banks are specifically and comprehensively covered by another section of the statute, 12 U. S. C. 36. Thus, Section 36 (b) (App., *infra,* p. 18) deals particularly with branch banks of a constituent bank involved in a consolidation and, in effect, permits the consolidated association to *retain* and operate branches of a constituent bank only if they were in lawful operation on February 25, 1927.[7] And, with respect to the establishment

[7] The petitioner closed a branch in Saginaw (and three branches in Grand Rapids) upon consolidation, in 1941, in accordance with requirements of 12 U. S. C. 36 (b). Although the right to *retain* this branch of the Saginaw Bank admittedly did not survive the consolidation of 1941, petitioner now argues that the right of the

of a *new* branch, 12 U. S. C. 36 (c) (App., *infra*, pp. 18–19), by incorporating state law, discloses an unmistakable purpose on the part of Congress to equate the branching privileges of a national bank, whether consolidated or not, with those of a state bank similarly situated.[8] In contrast to the specific and detailed provisions of Section 36, Section 34a on which petitioner relies is silent on the particular subject of the establishment and operation of branch banks by a consolidated national bank. The general words in Section 34a which petitioner stresses must be read together with the precise and particular provisions which Section 36 contains with respect to branching. Nothing in the history of Section 34a lends support to petitioner's view that Congress intended, by its general clauses relating to consolidation, that additional branching privileges should accrue to a consolidated national bank which are not available to other national or state banks, and such a construction would plainly run counter to the indisputable policy

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Saginaw National Bank, not to *retain* an established branch but to open a *new* branch, survived the consolidation. Such reasoning is difficult to follow because, if 12 U. S. C. 36 (b) (relating to *retention* of banks established prior to February 25, 1927) is admittedly applicable, 12 U. S. C. 36 (c) (relating to the establishment of *new* branches) likewise should be applicable.

[8] Pursuant to 12 U. S. C. 36 (c) and Sec. 114 of the Michigan Financial Institutions Act (17 Mich. Stat. Ann., § 23.867, App. *infra*, p. 16 (prior to its 1945 amendment), petitioner was permitted, in 1941, to establish and operate branch banks in the six cities (other than Lansing) in which its constituent banks did business. 39 Op. A. G. 469; *Rushton* v. *Michigan National Bank*, 298 Mich. 417, 299 N. W. 129.

of Section 36 to place the branching rights of national and state banks on a par.[9]

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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JULY 1956.

[9] In Michigan, petitioner's construction of Section 34a would permit it to indulge in a practically unlimited network of branching, since (on its view) petitioner could consolidate with other banks throughout the State and then claim the right to use the branching rights of those new constituent banks. State banks in Michigan could not adopt such a procedure; see Secs. 34 and 114 of the Michigan Financial Institutions Act, App. *infra*, pp. 15–16.

APPENDIX

1. Section 34 of the Michigan Financial Institutions Act (17 Mich. Stat. Ann. § 23.762) provides as follows:

> Any bank having a capital of at least $50,000.00 may, with the written approval of the commission, establish and operate a branch or branches within a village or city other than that in which it was originally chartered: *Provided*, That the village or city in which it is proposed to establish and operate a branch is located in the same county in which the parent bank has its principal office or, if not in said county, then within 25 miles of said parent bank or in a contiguous county at a point more than 25 miles from the parent bank, if such county has no bank: *Provided further*, That no such branch shall be established in a city or village in which a state or national bank or branch thereof is then in operation: *Provided further*, That the commission shall not grant such approval unless the parent bank has capital and surplus in an amount at least equal to the aggregate minimum capital and surplus, respectively, required for the establishment of a bank in each of the various places where such bank and its branches are to be located and and unless the commission is satisfied as to the sufficiency of the capital and surplus of the bank, the necessity for the establishment of such branch or branches and the prospects of successful operation if established.
>
> Any bank may, with the written approval of the commission, establish and operate a branch or branches within the limits of the city or village in which said bank is located: *Provided*, That the commission is satisfied as to the neces-

> sity for the establishment of such branch and the prospects of successful operation if established. No branch of any such bank shall be moved from 1 location to another within the same city or village without the written approval of the commission.

Section 114 of the Michigan Financial Institutions Act (17 Mich. Stat. Ann. § 23.867) provides, in part, as follows:

* * * * *

> Subject to the requirements, restrictions and limitations of section 34 of this act, any consolidated bank resulting from the consolidation of two or more state banks or any one or more banks or trust companies, as provided for in section one hundred four of this act, and any state bank or national banking association which purchases the assets of a state bank, as provided for in section one hundred twelve of this act, may, with the written permission of the commission, establish and operate as a branch or branches the consolidating trust company, bank or banks or any bank which sells its assets to another state bank or national banking association, as provided in section one hundred twelve of this act.

2. Pertinent provisions of the National Bank Act, as amended, 12 U. S. C. 21, *et seq.*, provide as follows:

> § 33. Any two or more national banking associations located within the same State, county, city, town, or village may, with the approval of the Comptroller of the Currency, consolidate into one association under the charter of either existing banks, * * *.
>
> § 34a. Any bank incorporated under the laws of any State, or any bank incorporated in the District of Columbia, may be consolidated with a national banking association located in the same State, county, city, town, or village under the charter of such national banking associa-

tion * * *. Upon such a consolidation, * * * the corporate existence of each of the constituent banks and national banking associations participating in such consolidation shall be merged into and continued in the consolidated national banking association and the consolidated association shall be deemed to be the same corporation as each of the constituent institutions. All the rights, franchises, and interests of each of such constituent banks and national banking associations in and to every species of property, real, personal, and mixed, and choses in action thereto belonging, shall be deemed to be transferred to and vested in such consolidated national banking association without any deed or other transfer; and such consolidated national banking association, by virtue of such consolidation and without any order or other action on the part of any court or otherwise, shall hold and enjoy the same and all rights of property, franchises, and interests, including appointments, designations, and nominations and all other rights and interests as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics and in every other fiduciary capacity, in the same manner and to the same extent as such rights, franchises, and interests were held or enjoyed by any such constituent institution at the time of such consolidation: * * *.

§ 36. [R. S. § 5155, as amended]. The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:

(a) A national banking association may retain and operate such branch or branches as it may have had in lawful operation on February 25, 1927, and any national banking association which continuously maintained and operated not more than one branch for a period of more than twenty-five years immediately preceding

February 25, 1927, may continue to maintain and operate such branch.

(b) If a State bank is after February 25, 1927, converted into or consolidated with a national banking association, or if two or more national banking associations are consolidated, such converted or consolidated association may, with respect to any of such banks, retain and operate any of their branches which may have been in lawful operation by any bank on February 25, 1927.

(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. In any State in which State banks are permitted by statute law to maintain branches within county or greater limits, if no bank is located and doing business in the place where the proposed agency is to be located, any national banking association situated in such State may, with the approval of the Comptroller of the Currency, establish and operate, without regard to the capital requirements of this section, a seasonal agency in any resort community within the limits of the county in which the main office of such association is located, for the purpose of receiving and paying out deposits, issuing and cashing checks and drafts, and doing business incident thereto:

Provided, That any permit issued under this sentence shall be revoked upon the opening of a State or national bank in such community. Except as provided in the immediately preceding sentence, no such association shall establish a branch outside of the city, town, or village in which it is situated unless it has a combined capital stock and surplus equal to the combined amount of capital stock and surplus, if any, required by the law of the State in which such association is situated for the establishment of such branches by State banks, or, if the law of such State requires only a minimum capital stock for the establishment of such branches by State banks, unless such association has not less than an equal amount of capital stock.

* * * * *

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AUG 13 1956
JOHN T. FEY, Clerk

No. 220

Supreme Court of the United States

OCTOBER TERM, 1956

MICHIGAN NATIONAL BANK, A National Banking Association, *Petitioner*,

v.

RAY M. GIDNEY, Comptroller of the Currency, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

INTRODUCTION

In the courts below petitioner asserted two alternative and completely independent grounds for the declaratory relief which it seeks. The first issue is important to the entire national banking system: it is the question whether the Congress has confined the branching power of every national banking association in the country to the limits prescribed for state banks by the law of the state in which the particular national bank is operating, or whether Congress has

given consolidated national banking institutions certain paramount Federal branching rights. It is the national importance of this first issue which in petitioner's view calls for a writ of certiorari in this case.

Petitioner's alternative claim for relief is admittedly of less importance, for it depends upon an interpretation of a Michigan statute whose effect will not be directly felt beyond the boundaries of that state. Because of this disparity in significance the petition was directed entirely to the propriety of certiorari review of the first of the foregoing issues; the second issue was reserved without discussion until such time as the Court should review the case on the merits.

Respondent appears to have mistaken the order of importance of the two issues. His Brief in Opposition is directed mainly to justifying, on the merits, the interpretation which the courts below placed upon the Michigan statute. Petitioner, however, does not think it proper to burden the Court here with an argument either on the importance or the merits of this secondary issue, and we will here limit our argument to the single, primary issue. But it should not be thought that our decision to leave the merits of the secondary issue for discussion at a later time implies a concession that respondent's position thereon is valid. If certiorari is granted, we will demonstrate that all of the available legislative materials bearing on the meaning of the Michigan statute here involved (including the legislative history and development of the statute, its internal structure, and the plain meaning of similar language in other provisions of Michigan banking law) require reversal of the holding be-

low on the secondary as well as the primary issue involved.[1]

REASONS FOR GRANTING THE WRIT

The issue which in petitioner's view calls for a grant of certiorari in this case turns upon the interpretation of the provision of Federal law which governs the consolidation of all national banks—12 U.S.C. Section 34a. Although its interpretation in this case is of manifest importance to national banks throughout the country, the Court of Appeals, as respondent observes, "apparenlty considered it unnecessary to discuss" the provision at all. Brief in Opp., p. 10. Petitioner believes that the Court of Appeals, in thus ignoring an important and clear-cut Federal issue which was placed squarely before it, has failed to perform its proper appellate function and that for this reason this Court should now grant certiorari. Without such a grant petitioner will never have had its contention considered by a Federal appellate court.

[1] In discussing the secondary issue respondent has made one assertion whose validity must be challenged here. He asserts that "the disposition of the case" depends upon construction of a state statute which has never been authoritatively construed by the state courts, and that on this ground alone this Court should decline to adjudicate the case (citing Federation of Labor v. McAdory, 325 U.S. 450 (1945)). Brief in Opp. n. 2, p. 6. The argument overlooks a number of facts: (1) in the first place, it is "the disposition" of only one of petitioner's *two alternative* claims for relief which involves the construction of a state statute, and it is the *other* wholly alternative claim upon which the grant or denial of this petition depends; (2) the state statute here involved has been incorporated by reference into and thus made a part of *Federal* law (see 12 U.S.C. Section 36(c)); (3) Meredith v. Winter Haven, 320 U.S. 228, 234-238 (1943) has made clear that the Federal courts have an affirmative *duty* to adjudicate questions of the kind presented here.

As pointed out in the petition, if 12 U.S.C. Section 34a is read as it is written, every consolidated national bank is actually the sum of its continuing constituent banks. Each of these continuing constituents retains, after consolidation, the statutory authority to branch under the terms of 12 U.S.C. Section 36, and this authority, together with other authority, by the express wording of Section 34a, may continue to be exercised, after consolidation, by the consolidated institution itself "in the same manner and to the same extent as such rights, franchises, and interests were held or enjoyed by any such constituent institution at the time of such consolidation". While that is what the statute says, respondent has construed it as though the right of the constituent banks to branch had been extinguished upon consolidation. As a result consolidated national banks throughout the country have been prevented from carrying out the expansion programs for which the Congress evidently sought to establish a statutory basis in 1933. In any case, whatever interpretation is to be placed upon 12 U.S.C. Section 34a, resolution of that interpretative issue will have deep significance to national and state banks throughout the nation.

It is most revealing that although the petition alleges that the court below "decided an important question of Federal law which has not been, but should be, settled by this Court" (Petition, p. 5), respondent's brief opposes a grant of certiorari solely on the ground that petitioner's position on the merits of the issue is erroneous. We think it fair to assume that respondent recognizes the great impact which petitioner's contentions would have upon the national banking system if they were upheld by this Court, and

such recognition, we submit, may be taken as *prima facie* evidence that certiorari review is appropriate.

Respondent, moreover, has not come forward with any persuasive reasons in support of his assertion that petitioner's claim is "meritless". For example, he states that 12 U.S.C. 36(c) was intended to tie all national bank branching rights to state law, "whether [the particular national bank is] consolidated or not", but he does not explain *why* he is entitled to ignore the consolidated status of the bank under 12 U.S.C. Section 34a. Brief in Opp., p. 13. Again, he says that 12 U.S.C. 34a, which authorizes a consolidated bank to enjoy "*all* of the rights, franchises and interests" of its continuing constituents, "is silent" as to branching rights, and from this he reasons that branching rights are somehow to be excluded from the term "all". Brief in Opp., p. 13. But 12 U.S.C. 34a does not pass *any* rights specifically; indeed its very failure to do so (*i.e.*, its use of all-inclusive language) requires the conclusion that the branching rights of the continuing constituents are to be enjoyed by the consolidated institution along with all other rights of its constituents.

Respondent also asserts that 12 U.S.C. 36(b) has some bearing upon petitioner's contention. That provision, however, was simply intended to give respondent an opportunity to test the economic propriety of certain pre-existing branches of banks participating in a consolidation before allowing such branches to continue in operation. The provision operates as follows: if a branch was in existence before February 25, 1927, it can continue in operation after the consolidation without interruption; if it was established after February 25, 1927, it must be "formally relinquished" at the time of consolidation, but, if re-

spondent then decides that its continued operation would be desirable, it can be immediately reopened without any real break in the continuity of its operation. See 36 Op. Atty. Gen. 116, 119 (1929). The full effect of 12 U.S.C. 36(b) is thus to authorize respondent to close *existing* branches upon a consolidation of national banks if he finds that economic circumstances require such action. He admittedly has the same authority to prevent consolidated banks from opening *new* branches that are economically undesirable. But neither that authority nor 12 U.S.C. 36(b) affects the legal eligibility of a consolidated bank to exercise its constituents' branching rights under 12 U.S.C. 34a.

Finally, the Court should not be misled by respondent's statement that "[i]n Michigan, petitioner's construction of Section 34a would permit it to indulge in a practically unlimited network of branching, since (on its view) petitioner could consolidate with other banks throughout the State and then claim the right to use the branching rights of those new constituent banks." Brief in Opp., n. 9, p. 14. The statement rests upon the erroneous assumption that if a national bank enjoys the statutory authority to consolidate or branch, it can use such authority at will. The facts are otherwise. Under the specific terms of both the consolidation and the branching provisions of the national banking laws, no expansion can be effected by any national bank until it has applied to, and received the economic approval of, respondent himself. 12 U.S.C. Sections 33, 36. No "unlimited network of branching", therefore, can be effected by petitioner, by means of consolidation or otherwise, except through a step-by-step procedure in which each step is examined and approved by respondent as being financially sound and in the public interest. Petitioner is not here ask-

ing for unrestricted power to establish new Michigan offices wherever it wishes; it is asking only that it be declared legally *eligible* to establish branches in such places as are or may become open to it pursuant to (a) the relevant statutes (12 U.S.C. Sections 34a, 36) *and* (b) the determinations of financial propriety to be made by respondent in the future.

CONCLUSION

Since the petition presents an important question of Federal law which has not been, but should be, settled by this Court, and since respondent has failed to show any valid reason why the question should not be so resolved, it is respectfully submitted that a writ of certiorari should issue to the Court of Appeals for the District of Columbia Circuit.

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